No. ____

Supreme Court, U.S.
FILED
061501 MAY 14 2007
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In The Supreme Court of the United States

SHERRI WILLIAMS; B.J. BAILEY; ALICE JEAN COPE; JANE DOE; DEBORAH L. COOPER; BENNY COOPER; DAN BAILEY; JANE POE; JANE ROE,

Petitioners,

v.

TROY KING, in his official capacity as the Attorney General of Alabama,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Paul John Cambria, Jr.
Counsel of Record
LIPSITZ GREEN SCIME & CAMBRIA, LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

Counsel for Petitioners

Of Counsel:

Roger W. Wilcox, Jr.
Amy L. Herring

THE LEX GROUP DC • 1750 K Street, NW • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Did the Eleventh Circuit Court of Appeals employ an insufficient constitutional analysis when it erroneously upheld an Alabama sexual device law that impermissibly burdens consensual private conduct that is protected by the Due Process Clause of the Fourteenth Amendment to the same extent as the private sexual conduct that was at issue in *Lawrence v. Texas,* 539 U.S. 558 (2003)?

2. Can a public morality rationale alone ever justify government intrusion into personal decision-making concerning private sexual conduct?

3. Where a fundamental right is not involved, does substantive due process analysis require that the government establish an interest sufficient to justify its intrusion upon an individual's protected liberty?

PARTIES TO THE PROCEEDINGS

Petitioners:

Sherri Williams
B.J. Bailey
Dan Bailey
Benny G. Cooper
Deborah L. Cooper
Alice Jean Cope
Jane Doe
Jane Poe
Jane Roe

Respondents:

Troy King, Attorney General of Alabama[1]

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[1] Tim Morgan, District Attorney of Madison County, Alabama, is listed in the caption of the Eleventh Circuit Court of Appeals' judgment entered on February 14, 2007, but he was dismissed as a defendant by stipulation of dismissal filed by the plaintiffs on December 3, 1998. *See, Williams v. Pryor*, 41 F. Supp. 2d 1257, 1260, n.5 (N.D. Ala. 1999).

DISCLOSURE OF PARENT AND SUBSIDIARY COMPANIES PURSUANT TO RULE 29.6

This petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit has not been filed on behalf of any non-governmental corporation.

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On March 29, 1999, the United States District Court for the Northern District of Alabama entered a decision granting summary judgment to petitioners, and enjoining enforcement of Alabama Code § 13A-12-200.2(a)(1). This opinion is *Williams v. Pryor,* 41 F. Supp. 2d 1257 (N.D. Ala. 1999) ("*Williams I*"), and is reprinted in the Appendix ("Pet. App.") at Pet. App. 133-212. In *Williams v. Pryor,* 229 F.3d 1331 (11th Cir. 2000), the Eleventh Circuit Court of Appeals entered a decision on October 12, 2000, reversing the District Court and remanding the case for further proceedings. That opinion was later withdrawn and was superseded by *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) ("*Williams II*"), which is reprinted at Pet. App. 213-33.

On remand, the District Court again granted summary judgment to the petitioners, and again enjoined enforcement of Alabama Code § 13A-12-200.2(a)(1) in a decision entered on October 10, 2002, and reported at *Williams v. Pryor*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002) ("*Williams III*"). See Pet. App. 234-333. In *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004) ("*Williams IV*"), the Eleventh Circuit Court of Appeals reversed the District Court in a decision entered on July 28, 2005, and remanded the case for further proceedings. See Pet. App. 17-71. Petitioners' requests for rehearing and rehearing *en banc* were denied in a decision entered on September 24, 2004. See *Williams v. Attorney General of Alabama*, 122 Fed. Appx. 988 (Table); Pet. App. 334. This Court thereafter denied the petition for a writ of certiorari filed by petitioners. See *Williams v. King*, 543 U.S. 1152 (2005).

On remand, the District Court denied petitioners' motion for summary judgment, and granted respondent's cross-motion for summary judgment in a decision entered on March 16, 2006. See *Williams v. King*, 420 F. Supp. 2d 1224 (N.D.

Alabama 2006) ("*Williams V*"); Pet. App. 73-132. In a decision entered on February 14, 2007, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court. See *Williams v. King*, 478 F.3d 1316 (11th Cir. 2007); Pet. App. 3-16.

JURISDICTION OF THIS COURT

The decision of the Eleventh Circuit affirming the District Court's denial of petitioners' motion for summary judgment and granting of respondent's cross-motion for summary judgment was entered on February 14, 2007. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code § 13A-12-200.2(a)(1):

> It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as primarily useful for the stimulation of human genital organs for anything of pecuniary value. Material not

> otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000).

STATEMENT OF THE CASE

The State of Alabama's statutory prohibition of the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs," Ala. Code § 13A-12-200.2(a)(1), violates the substantive due process protections of the Fourteenth Amendment of the United States Constitution. Petitioners contend that the Due Process Clause guarantees their right to use so-called "sexual devices" in private settings and in the context of private sexual relationships, and that the right to use sexual devices cannot be lawfully suppressed by a ban on the distribution of such devices within the state. The Eleventh Circuit Court of Appeals' recent decision affirming the District Court's denial of petitioners' motion for summary judgment rejects this due process protection, misconstrues this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), and unduly limits the Constitution's protection of each individual's liberty to decide "how to conduct their private lives in matters pertaining to sex." *Id.* at 572.

Petitioners seek to require that the State of Alabama recognize and protect their Fourteenth Amendment rights to distribute *and* purchase sexual devices within the state for the purpose of wholly private use. While Alabama Code § 13A-12-200.2(a)(1) does not bar simple possession of sexual devices described by the statute, its prohibition of the distribution of such devices effectively prevents the purchase of such items within the boundaries of the state. Alabama's prohibition of the distribution of sexual devices, therefore, directly interferes with each citizen's enjoyment of the liberty to engage in consensual, private sexual conduct free from government restraint.

This action was commenced under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Alabama to enjoin enforcement of a 1998 amendment of Alabama Code § 13A-12-200.2 that criminalized the sale of "any device designed or marketed as primarily useful for the "stimulation of human genital organs." Ala. Code § 13A-12-200.2(a)(1). The plaintiffs include: (1) several individuals who personally use sexual devices "either for therapeutic purposes related to sexual dysfunction, or as an alternative to sexual intercourse." *Williams v. Pryor*, 41 F. Supp. 2d at 1261; (2) Sherri Williams, principal shareholder of "Pleasures," an Alabama corporation that owns and operates retail stores in Huntsville and Decatur, Alabama that display and sell sexual devices; and (3) B.J. Bailey, the principal investor in "Saucy Lady, Incorporated" ("Saucy Lady"), an Alabama corporation that offers in-home "Tupperware-style parties" during which those who are invited to these private home functions are given the opportunity to purchase sexual devices and novelties. *Id.* at 1260.

The Statement of Undisputed Facts submitted by the parties (and reproduced in its entirety in the District Court's first memorandum opinion) describes the relevant facts concerning the "user plaintiffs" who

incorporate the use of sexual devices in their private sexual activities and the "vendor plaintiffs" who distribute such devices to adults who seek to purchase them. *Id.* at 1261-65. The "user plaintiffs" were four women who used sexual devices for several individually unique reasons: (1) a married woman "who uses the devices with her husband of twenty-five years, both to enhance their intimate relationship and to assist her in over-coming (sic) orgasmic difficulties"; a divorced single woman whose medical doctor recommended that she use sexual devices to successfully overcome anorgasmia; (3) a married woman who was sexually active, but anorgasmic, for approximately ten years before she began using sexual devices in her intimate relations with her husband; and (4) a divorced single woman who was encouraged by her therapist to use sexual devices to deal with post-partum depression and to improve her then-marital relationship. Subsequent to her divorce, this plaintiff used sexual devices to avoid the risk of contracting sexually transmitted diseases. *Id.* at 1264-65. All of the user plaintiffs were customers of the "Saucy Lady" in-home retailing company.

The "vendor plaintiffs," operating as "Pleasures" and "Saucy Lady," provided the user plaintiffs and other adults discrete ways to obtain sexual devices in Alabama. "Pleasures'" two stores within the state restrict access to persons at least 21 years old, and offer patrons a variety of adult-themed novelty products, including condoms, lubricants, and vibrators. According to the stipulation of undisputed facts, "Pleasures'" customers use sexual devices for several important reasons: to avoid the risk of acquiring a sexually transmitted disease; to improve intimate relationships with their partners; to obtain sexual satisfaction that they cannot experience without sexual devices; and to enjoy sexual satisfaction when a partner is not available. Though "Pleasures" offers a wide range of romance products, the stores do not resemble, or operate as, adult bookstores. *Id.* at 1262.

"Saucy Lady" is a retail business that sells sexual aids and novelties at parties hosted and attended by adult women in private homes throughout Alabama. Thousands of single, married, and divorced women have attended these private parties. "Saucy Lady" customers use sexual devices for a variety of reasons: to overcome anorgasmia and other difficulties achieving sexual satisfaction; to improve marital and sexual relations; to avoid the risk of acquiring a sexually transmitted disease through sexual relations with others; to achieve private sexual goals in the absence of a partner; and at the recommendation of a doctor or therapist. *Id.* at 1263-64.

The parties' undisputed stipulation of facts—which formed the basis of factual findings by the District Court that have never been challenged or set aside—also detailed the many recognized therapeutic uses of sexual devices. In the opinion of medical and psychological professionals, the inability to achieve orgasm through sexual intercourse is a treatable medical condition that, if left untreated, may jeopardize a woman's health and also destroy a marriage or relationship. Used by anorgasmic women, a vibrator may help those who are less physiologically responsive to stimuli than others. A vibrator can be used to produce intense stimulation that is difficult or impossible to duplicate through manual means, and which is particularly important to women who experience "orgasmic inhibition" as a result of cumulative non-orgasmic sexual experiences. A dildo or dildo-type vibrator can also be used in conjunction with the medically-recognized Kegel's exercise to assist women who suffer from urinary stress incontinence or an orgasmic response that is lessened in intensity due to relaxed pelvic muscles. *Id.* at 1265-66. Indeed, the Food and Drug Administration regulates the therapeutic use of "powered vaginal muscle stimulators" (to increase muscle tone and strength in the treatment of sexual dysfunction) and "genital vibrators" (for use in treatment of sexual

dysfunction or with Kegel's exercise). See, 21 C.F.R. §§ 884.5940 and 884.5960. *Id.* at 1266-67.

On the basis of these and other stipulated facts, the District Court considered plaintiffs' two central claims: (1) that the Due Process Clause of the Fourteenth Amendment recognizes a protected liberty interest in sexual privacy that includes the right to acquire and use the proscribe sexual devices; and (2) that the challenged statute is not rationally related to the government interests it supposedly advances. The court concluded that a fundamental right of sexual privacy conflicted with this Court's holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and that strict scrutiny of the challenged statute was not required because the liberty interest asserted by the plaintiffs was not established as fundamental under the substantive due process criteria set forth in *Washington v. Glucksberg*, 521 U.S. 702 (1997). *Williams v. Pryor*, 41 F. Supp. 2d at 1284.

However, the District Court enjoined enforcement of Alabama's statutory prohibition of the distribution of sexual devices on the ground that the law was not rationally related to any legitimate state interest. The court concluded that none of the three state interests that it considered "conceivable" were rationally promoted by the statute.

First, any legitimate interest Alabama might have in banning *public* displays of obscene material does not support a far-reaching restriction that criminalizes the sale of sexual devices in wholly *private* settings, such as in the homes of adults who invite B.J. Bailey's company, "Saucy Lady," to privately show sexual devices to groups of adult women or in retail stores like "Pleasures" that adapt their outward appearance to ensure that such devices are not displayed to an unwilling public. *Id.* at 1288.

Second, the state's purported interest in stemming the alleged evil of "commerce in sexual

stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships," is not rationally advanced by Alabama Code § 13A-12-200.2(a)(1). The statute bans the distribution of devices, but it does not ban actual commerce in sexual activities. Further, the court observed that "[b]anning commerce of sexual devices is not rationally related to this end, because such a ban inevitably interferes with sexual stimulation and auto-eroticism which *is* related to marriage, procreation, and familial relationships." *Id.* at 1288-89 (emphasis in original). Indeed, the importance of the proscribed devices in a marital context was not disputed by the state: "The use of these devices by married couples as an aid to marital relations, including sexual relations, is established by the parties' stipulations." *Id.* at 1289 (footnote omitted).

Third, the District Court found that the statute did not rationally further the state's conceivable interest in banning commerce in obscene material. Noting that the devices themselves generally "express nothing," *Id.* at 1290, the court concluded that many sexual devices would not be considered obscene under the standards of *Miller v. California*, 413 U.S. 15 (1973) because they do not represent human genitals. *Williams v. Pryor*, 41 F. Supp. 2d at 1292. Indeed, though certain anatomically realistic devices might be found obscene, "a majority, or at least a significant minority, of the proscribed devices, as a matter of law, are not obscene under any established definition of obscenity." *Id.* at 1292-93.

The first appeal of this case to the Eleventh Circuit Court of Appeals resulted in reversal of the District Court's order granting a permanent injunction against enforcement of Alabama Code § 13A-12-200.2(a)(1). In *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001), the Court of Appeals rejected the District Court's conclusion that the statutory prohibition of the distribution of sexual devices did not have a rational basis. Finding that the statute was

rationally based on a legitimate state interest in public morality, the Court of Appeals explained, further, that "[t]he criminal proscription on the distribution of sexual devices certainly is a rational means for eliminating commerce in the devices, which itself is a rational means for making the acquisition and use of the devices more difficult." *Id.* at 949-50.

On the fundamental rights question, the Court of Appeals affirmed the District Court's determination that the statute was not unconstitutional on its face, concluding that the statute was not unconstitutional in every application. However, the court remanded the case to the District Court to give plaintiffs' as-applied challenges "the kind of careful consideration the Supreme Court performed in *Glucksberg*," *Id.* at 956, explaining that although the statute is not facially unconstitutional because it may constitutionally be enforced against those who sell to minors sexual devices that are deemed harmful to them, "the as-applied challenges raised by the plaintiffs, married or unmarried, implicate different and important interests in sexual privacy." *Id* at 955.

On remand, the District Court applied the *Glucksberg* test to answer the question posed to it by the Court of Appeals: "whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons nor whether contemporary practice bolsters or undermines any such history." *Williams v. Pryor,* 220 F.2d 1257, 1273 (N.D. Ala. 2002).

After reviewing extensive evidence concerning the history of sexual privacy of married and unmarried persons in America from colonial times forward, the court made numerous findings. The court found that plaintiffs had proven "that there is a historical practice and contemporary trend of legislative and societal liberalization of attitudes toward consensual, adult sexual activity, and a

concomitant avoidance of prosecutions against married and unmarried people for violations of statutes that proscribe consensual sexual activity." *Id.* at 1294. Particularly with respect to the use of sexual devices such as "the vibrators, dildos, anal beads, and artificial vaginas distributed by the vendor plaintiffs," the court concluded:

> Plaintiffs' evidence shows, first, that such sexual devices are used by individuals (including plaintiffs) to consummate the most private acts—whether they be medically, therapeutically, or sexually motivated. The user plaintiffs all have averred that their own use of these devices is contained within the confines of their adult sexual relationships. . . . Moreover, one of the most widely known sexual devices—the vibrator—has been legally and widely available since its invention in the nineteenth century: first in doctors' offices, and later through magazine advertisements, mail-order catalogs, on the Internet, and retail outlets in the forty-seven states that do not restrict distribution of sexual devices. Just as states have deliberately avoided interference in the sexual relationships of married and unmarried adults (historically as to married adults, and contemporarily as to unmarried adults), states have deliberately, and with few exceptions, avoided the regulation of these sexual devices. The fact that history and contemporary practice demonstrate a conscious avoidance of regulation of these devices by the states, along with the fact that such devices are used in the performance of deeply private sexual acts, supports a finding that the right to use these sexual devices is encompassed by plaintiffs' right to sexual privacy.

Id. at 1296.

The District Court then concluded that Alabama Code § 13A-12-200.2(a)(1) impermissibly burdened plaintiffs' right to sexual privacy by prohibiting distribution of sexual devices. Reviewing the plaintiffs' evidentiary submissions, the court found that the facts supported plaintiffs' contention that "taken as a whole, these devices are designed to improve or enhance sexual relations or provide an alternative to them." *Id.* at 1297 (footnote omitted). Noting this Court's analogous comments regarding the total prohibition of the sale of contraceptives in *Carey v. Population Services International*, 431 U.S. 678, 687-88 (1977), the court explained that access to sexual devices is essential to the exercise of the right of sexual privacy: "A statute solely prohibiting the sale of a product can nevertheless unconstitutionally infringe on the rights inherent in the 'zone of privacy created by several fundamental constitutional guarantees' because, in essence, a ban on the *sale* of these sexual devices can amount to an impermissible burden on their *use*." *Id.* at 1298 (citation omitted; emphasis in original). Because Alabama's prohibition of the sale of sexual devices "imposes a significant burden on the right of married and unmarried persons to sexual privacy, in that it severely limits their ability to access, and thus to use, sexual devices within their sexual relationships," the District Court granted plaintiffs' motion for summary judgment, and issued an order again enjoining the enforcement of Alabama Code § 13A-12-200.2(a)(1). *Id.* at 1298, 1307.

On the second appeal of this case to the Eleventh Circuit, the Court of Appeals reversed the judgment of the District Court in a 2-1 decision. *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004), *cert denied*, 125 S. Ct. 1335 (2005). The court acknowledged that "[f]or purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item," *Id.* at 1242. Because an individual's ability to use sexual devices is burdened by a ban on the distribution of such devices, "our

analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices." *Id.* Examining the District Court's findings in that light, a majority of the Court of Appeals panel concluded that plaintiffs had failed to establish a fundamental right under *Glucksberg*, and reversed the court's grant of summary judgment to the plaintiffs. *Id.* at 1242, 1250.

However, because this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) was decided while the second appeal was pending, the Court of Appeals remanded the case to the District Court to consider the impact of *Lawrence*'s explicit overruling of *Bowers v. Hardwick*, *supra*. Noting that the *Lawrence* opinion employed rational basis review and did not engage in a fundamental-rights analysis, the Eleventh Circuit declined to infer a fundamental right to sexual privacy from *Lawrence*. *Id.* at 1238. The Court of Appeals left it to the District Court to determine, on remand, "whether our holding in *Williams II* that Alabama's law has a rational basis (*e.g.*, public morality) remains good law now that *Bowers* has been overruled." *Id.* at 1238, n. 9.

On remand, plaintiffs filed a motion for summary judgment contending that, after this Court's decision in *Lawrence v. Texas*, *supra*, the Alabama ban on the distribution of sexual devices could not be justified by a public morality motivation. The District Court disagreed, granting summary judgment to the state after concluding that "the holding in *Williams II*—that the subject Alabama statute has a rational basis (*e.g.*, public morality)—remains 'good law,' even though *Bowers v. Hardwick* has been overruled." *Williams v. King*, 420 F. Supp. 2d 1224, 1254 (N.D. Ala. 2006). The court explained that the instant case is distinguishable from *Lawrence* in that "the Alabama statute does not offend the human dignity of a stigmatized class of individuals, nor implicate equal protection concerns about targeting a 'discrete and

insular minority' for discrimination or harm out of simple hostility in a way that requires the court to find the law unconstitutional under *Lawrence*." *Id.*

On the third appeal of this case to the Eleventh Circuit, the Court of Appeals affirmed the District Court's granting of summary judgment to the state. The court noted that "[t]o the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private *and* non-commercial." *Williams v. King*, 478 F.3d 1316, 1322 (11th Cir. 2007). Since the challenged Alabama law focuses on the "inherently public activity" of commerce in sexual devices, the state's interest in promoting public morality is a valid rational basis for prohibiting the distribution of sexual devices. *Id.* at 1323. Accordingly, the Court of Appeals concluded that "public morality survives as a rational basis for legislation even after *Lawrence*, and we find that in this case the State's interest in the preservation of public morality remains a rational basis for the challenged statute." *Id.*

REASONS FOR GRANTING THE WRIT

I. Applying A Diluted Constitutional Standard, The Eleventh Circuit Court Of Appeals Has Erroneously Upheld An Alabama Statute That Impermissibly Burdens Consensual Private Conduct Protected By The Due Process Clause To The Same Extent As The Private Sexual Conduct In *Lawrence v. Texas*.

The logical application of this Court's ruling in *Lawrence v. Texas*, *supra*, renders the State of Alabama's prohibition of the commercial distribution of sexual devices unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment. Such a law, predicated on conceptions of public morality enforced by the state through the criminal code, derogates important personal privacy protections

recognized by *Lawrence* as substantive due process rights. Ruling that *Lawrence* is distinguishable from the instant case on the ground that the Alabama law restricts *public, commercial activity*, not *private* sexual conduct, the Eleventh Circuit ignored its obligation to evaluate petitioners' substantive due process rights in the context of those cases where it has been recognized that "[f]or purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item." *Williams v. Attorney General of Alabama*, 378 F.3d at 1242; *see also, Carey v. Population Services International*, 431 U.S. at 688 (where restrictions on the sale of contraceptives were acknowledged as burdens on the right to use contraceptives). The Court of Appeals' failure to employ the appropriate constitutional analysis of petitioners' due process claims resulted in the court's erroneous rejection of *Lawrence* as the governing rule in this case, and the denial of constitutional privacy protection for the most intimate and private activities of adults in Alabama.

As Justice Kennedy explained in *Lawrence*,

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Lawrence v. Texas, 539 U.S. at 562. Expressly overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the *Lawrence* Court recognized both the liberalization of American society's attitude toward the private sexual choices of its citizens, as well as the judicial extension of constitutional due process protections to

those choices. From the rights to privacy acknowledged in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a state law prohibiting the use of contraceptive drugs and devices), and in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"), to *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973), in part, on the due process protections of the Fourteenth Amendment), the *Lawrence* Court tracked the expansion of personal privacy rights recognized by this Court.

Significantly, the *Lawrence* Court also noted that the recognition of personal privacy rights with respect to sexual choices may conflict with ethical, moral, and religious beliefs, but warned that the state may not use the criminal law to enforce those beliefs on society as a whole. In so doing, the Court emphasized that Justice Stevens' dissenting opinion in *Bowers* controlled in *Lawrence*:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Lawrence v. Texas, 539 U.S. at 577-78, *quoting Bowers v. Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting; footnotes and citations omitted).

Thus, *Lawrence* logically must be construed to ensure protection of an adult's substantive due process right to make personal choices concerning the use and enjoyment of sexual devices. Indeed, Justice Scalia declared as much in his dissent in *Lawrence*, where he observed that the Court's adoption of Justice Stevens' dissent in *Bowers* with respect to *not* criminalizing certain personal sexual choices would effectively obliterate government regulation of private sexual conduct on the basis of moral conceptions, including obscenity: "This effectively decrees the end to all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational basis review." *Lawrence v. Texas*, 539 U.S. at 599.

In petitioners' case, however, the Eleventh Circuit found *Lawrence* inapplicable despite the clear impact of Alabama Code § 13A-12-200.2(a)(1) on the user plaintiffs' exercise of their rights to make personal decisions concerning private sexual conduct without government interference:

> However, while the statute at issue in *Lawrence* criminalized *private* sexual conduct, the statute at issue in this case forbids *public, commercial* activity. To the extent that *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private *and* non-commercial.

Williams v. King, 478 F.3d at 1322 (emphasis in original). The Court of Appeals concluded that *Lawrence* did not govern its resolution of petitioners' substantive due process challenge against Alabama's ban on the distribution of sexual devices because

"[t]his statute targets *commerce* in sexual devices, an inherently public activity, whether it occurs on a street corner, in a shopping mall, or in a living room." *Id.* (emphasis in original).

The Eleventh Circuit's rejection of *Lawrence* as controlling precedent in this case rests on a suspect foundation. At the heart of petitioners' argument that the Due Process Clause protects their liberty to utilize sexual devices in the context of their intimate relationships and private conduct is the reality that Alabama's prohibition of the commercial distribution of such devices within the state impermissibly burdens the exercise of petitioners' due process rights. *See, e.g., Carey v. Population Services International*, 431 U.S. 687-88 ("Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use"). Indeed, in its 2004 decision in this case, the Court of Appeals expressly recognized the importance of the interrelationship between the right to use sexual devices and the availability of such devices:

> Because a prohibition on the distribution of sexual devices would burden an individual's ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to use such devices.

Williams v. Attorney General of Alabama, 378 F.3d at 1242 (emphasis in original).

Inexplicably, when the Court of Appeals revisited the *Lawrence* issue on the latest appeal after the case was remanded to the District Court for consideration of the impact of *Lawrence* on the rational basis analysis of the challenged statute, it

completely ignored the burdens imposed on an individual's use of sexual devices by a ban on the sale of such devices. Indeed, not only did the court ignore what it had previously acknowledged as a crucial part of the constitutional analysis, but it actually highlighted the sale of sexual devices as a reason to distinguish *Lawrence* from the instant case. In essence, the Court of Appeals pointed out in one decision that a privacy right to use sexual devices cannot be denied merely because the state desires to eliminate their commercial availability, and in its next decision in the same case proceeded to do just that—reject the privacy protections of *Lawrence* precisely because the Alabama law prohibits commerce in sexual devices.

This analytical error deprived petitioners of a key protection of the substantive due process analysis: the understanding that "restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item." *Id.* Rather than recognize that Alabama's prohibition of the commercial distribution of sexual devices is equivalent to restricting the private use of sexual devices, the Court of Appeals construed the commercial nature of the law's restrictions as grounds to refuse to extend to sexual device users the privacy protection afforded by *Lawrence* to adults with respect to decisions regarding consensual, private sexual conduct. In so doing, the Court of Appeals (1) disregarded its prior admonition that the right to use an item can be burdened by government interference with the availability of the item; and (2) penalized petitioners by construing the public, commerce-oriented nature of Alabama Code § 13A-12-200.2(a)(1) as a reason to distinguish the law from the regulation of purely private conduct in *Lawrence*.

A correct analysis of Alabama's prohibition of the commercial distribution of sexual devices would have recognized that the public sales ban directly burdens the *private* use of such devices, *see, e.g.*, *Carey*

v. Populations Services International, *supra*, and that the user's liberty interest with respect to the private use of sexual devices is indistinguishable from the liberty interest protected in *Lawrence*. Application of the *Lawrence* analysis to the question of whether Alabama may constitutionally prohibit the commercial distribution of sexual devices to consenting adults should result in a determination that Alabama cannot significantly restrict the commercial availability of sexual devices without impairing the rights of its adult citizens to an autonomy of self that includes the liberty to decide whether to use sexual devices in their intimate relations or private conduct, as well as the concomitant right to purchase such devices within the state.

II. The Eleventh Circuit's Decision Frames An Important Constitutional Question Regarding Whether A Public Morality Rationale Alone Can Ever Justify Government Intrusion Into Personal Decision-Making Concerning Private Sexual Conduct.

In *Lawrence v. Texas*, this Court unambiguously declared that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence v. Texas*, 539 U.S. at 577. The Court's rejection of the state's use of public morality as a sword to interfere with an individual's decisions concerning private, consensual sexual practices was so clear that Justice Scalia warned in his dissent that the era of morals legislation had ended. *Id.* at 599. Yet, despite the *Lawrence* Court's unmistakable conclusion that a public morality justification alone is not sufficient to justify infringement of an adult's protected liberty to engage in private sexual practices free of government intrusion, the Court of Appeals determined that "public morality survives as a rational basis for legislation even after *Lawrence*, and

we find that in this case the State's interest in the preservation of public morality remains a rational basis for the challenged statute. *Williams v. King*, 478 F.3d at 1323.

The Eleventh Circuit's conclusion that public morality is a legitimate basis for laws that burden private decisions regarding the most intimate sexual practices cannot be squared with the plain language this Court used in *Lawrence*. The only justification offered by the State of Texas for its homosexual sodomy law was promotion of public morality. The *Lawrence* Court dismissed the idea that a public morality concern was sufficient to authorize the state to regulate the private sexual practices of consenting adults: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. at 577.

Similarly, the only justification for Alabama's statute prohibiting distribution of sexual devices is "promotion and preservation of public morality." *Williams v. King*, 478 F.3d at 1319; *see also*, *Williams v. Pryor*, 240 F.3d at 949 (noting that the state maintains that "a ban on the sale of sexual devices and related orgasm stimulating paraphernalia is rationally related to a legitimate legislative interest in discouraging prurient interests in autonomous sex"). Citing morals-based laws concerning public indecency, obscenity, and the death penalty, the Eleventh Circuit explained that the existence of laws grounded in protection of public morality prevented it from reading "*Lawrence*, the overruling of *Bowers*, or the *Lawrence* court's reliance on Justice Stevens's dissent, to have rendered public morality altogether illegitimate as a rational basis." *Williams v. King*, 478 F.3d at 1323. The court also repeated its observation that, "[o]ne would expect the Supreme Court to be manifestly more specific and articulate than it was in *Lawrence* if now such a traditional and significant jurisprudential principle has been jettisoned wholesale . . ." *Id.*

The reason for the Eleventh Circuit's reluctance to apply *Lawrence*'s rejection of public morality as a sufficient justification for interference with the *private* intimate conduct of adults is unclear. Certainly, this Court could not have more clearly overruled *Bowers*, and it is difficult to envision how the Court could have been more "specific and articulate" when it warned that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence v. Texas*, 539 U.S. at 577. That moral judgments may underlie laws that prohibit public acts of indecency or obscenity, or authorize implementation of a particular penal sanction, does not prevent this Court from distinguishing those laws from legislation that burdens the protected liberty of adults to make decisions regarding their private intimate practices. The Court of Appeals failed to recognize this distinction and, consequently, erred in upholding a ban on commercial distribution of sexual devices that impermissibly burdens the protected right of adults to choose to use sexual devices in their intimate relationships or private sexual practices.

III. Even Where Fundamental Rights Are Not Implicated, Substantive Due Process Analysis Requires That The Government Have An Interest Sufficient To Justify Its Intrusion Upon An Individual's Protected Liberty.

Lawrence dictates an outcome in favor of the petitioners even if the challenged statute is analyzed for its rational basis. However, a better reading of *Lawrence* is that the Due Process Clause protects certain liberties from unjustified or unduly burdensome government intrusions—including those liberties that do not necessarily fall within the limited category of "fundamental rights" *Lawrence* is one of a line of cases in which this Court has analyzed due process claims under a standard more demanding

than traditional rational basis without expressly recognizing the existence of a fundamental right.

Though the Court's *Lawrence* analysis does not resemble traditional fundamental rights review, it does not adopt the language of rational basis review, either. For instance, the Court never suggested that the Texas sodomy statute was entitled to "a strong presumption of validity." *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). Moreover, the terms "arbitrary" and "irrational" never appear in the *Lawrence* opinion, and the Court did not suggest that the plaintiffs in *Lawrence* were required to "negate every conceivable basis" that might support the challenged law. *See, Heller v. Doe*, 509 U.S. 312, 320 (1993).

Instead, the *Lawrence* court held that Texas' purported interest in public morality "furthers no legitimate state interest which can justify its intrusion into the personal private life of the individual." *Lawrence v. Texas*, 539 U.S. at 578. Rational basis review simply does not consider such factors. Traditional rational basis analysis does not inquire as to whether the government's interest is sufficient to *justify* the limitation on the individual. Rather, the test is only whether the law might rationally promote a legitimate purpose.

Many of the Court's recent due process cases have eschewed the strict scrutiny/rational basis dichotomy and instead have weighed the individual's liberty interest against the government's interest in intruding upon that liberty. *See, e.g., Sell v. United States*, 539 U.S. 166 (2003) (balancing an individual's interest in refusing psychotropic drugs against the government's desire to try a competent criminal defendant for a non-violent crime); *Riggins v. Nevada*, 504 U.S. 127 (1992) (balancing an individual's interest in refusing psychotropic drugs against the government's interest in trying a competent criminal defendant for a violent crime); *Washington v. Harper*,

494 U.S. 210 (1990) (weighing an individual prisoner's interest in refusing psychotropic drugs against the government's interest in promoting the safety of inmates); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990) (balancing an individual's protected liberty interest in refusing unwanted medical treatment against the government's interests in promoting life and protecting the sick and vulnerable); *Young v. Romeo*, 457 U.S. 307 (1982) (balancing an individual's interest in freedom from restraint against the government's interest in the efficient operation of a residence for the mentally ill); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (balancing an individual's due process right to travel against the government's interest in national security).

The language used by the Court in *Lawrence* suggests that it is a "protected liberty" case (versus a "fundamental rights" case) in which state interests are balanced against the liberty interests of the individual. In such cases, protected liberties need not be deemed "fundamental rights" under the Due Process Clause in order to warrant protection from unjustifiable government interference. Rather, the question is whether the purported state interest justifies the particular burden(s) imposed in a particular case. As the cited cases demonstrate, when the state advances a sufficiently strong interest warranting the challenged burden on an individual's protected liberty, the Due Process Clause will allow the intrusion.

For instance, in *Washington v. Harper*, *supra*, the Court determined that the state's interests in prison safety and security were an adequate justification trumping the inmate's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Id.* at 220. Likewise, in *Young v. Romeo*, *supra*, the Court balanced the "liberty of the individual" against the "demands of an organized society," and concluded that the state's interests would prevail as long as "professional judgment"

supported the decision to deprive the individual of his liberty. *Id.* at 321. Similar analyses were used by the Court in contexts that did not involve incarceration or civil commitment. *See, e.g., Cruzan v. Missouri Dep't of Health, supra; Riggins v. Nevada, supra; Sell v. United States, supra.*

These cases illustrate that this Court's due process jurisprudence recognizes that even though there may be only a limited category of "fundamental" rights that automatically trigger strict scrutiny, there are other protected liberties that warrant greater protection than rational basis review typically offers. In this line of "protected liberty" cases, the Court has utilized a nuanced approach, giving it the flexibility to determine whether, on balance, the government interest asserted justifies the burden imposed on the individual's liberty. *See, e.g., Aptheker v. Secretary of State*, 378 U.S. at 509 (internal quotations and citations omitted) ("There are well-established principles by which to test whether the restrictions here imposed are consistent with the liberty guaranteed in the Fifth Amendment . . . the Constitution requires that the powers of government must be so exercised as not, in attaining a permissible end, unduly to infringe a constitutionally protected freedom").

In *Lawrence*, this Court balanced Texas's interest in promoting public morality against the burden imposed by the challenged sodomy law on the liberty interests of those engaging in consensual, private sexual conduct. The Court concluded that the fact that a majority within a state may view certain personal sexual decisions as immoral is not a sufficient justification for burdening the liberty of others who feel differently. *Lawrence v. Texas*, 539 U.S. at 571, *quoting Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. at 850 ("Our obligation is to define the liberty of all, not to mandate our own moral code"). Applying the balancing analysis of these "protected liberty" cases to the rights burdened by Alabama Code

§ 13A-12-200.2(a)(1), the balance tips decidedly in favor of the petitioners.

In this case, as in *Lawrence*, the only interest recognized by the Eleventh Circuit in support of Alabama's prohibition of the commercial distribution of sexual devices is public morality. The challenged law, as in *Lawrence*, burdens private sexual intimacy between consenting adults. Further, like *Lawrence*, this case does not involve minors, persons who might be coerced or injured, public sexual conduct, or prostitution. Consequently, just as public morality was insufficient to justify the burden placed on individual liberty by the sodomy law challenged in *Lawrence*, the public morality justification asserted in support of the Alabama statute does not outweigh the burden imposed on the protected liberty interest of individuals in making personal decisions regarding how they will conduct their private and intimate sexual lives.

Moreover, petitioners contend that the District Court's comprehensive *Glucksberg* analysis lends important support to this "protected liberty" analysis. Even if the Court accepts the Eleventh Circuit's conclusion that application of the *Glucksberg* factors does not establish the existence of a fundamental right, *Williams v. Attorney General of Alabama*, 378 F.3d at 1242, the lengthy history of widespread availability of sexual devices to private individuals coupled with the liberalization of society's attitudes toward private sexual choices and a proven history of government reluctance to interfere with decisions concerning the intimate relations of married and unmarried people warrants the conclusion that petitioners enjoy a protected liberty interest sufficient to trump Alabama's claimed interest in promoting public morality.

CONCLUSION

Petitioners respectfully submit that this case presents nationally important questions concerning the application of this Court's precedents to liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Accordingly, petitioners respectfully request that the Court grant their petition for a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

Paul John Cambria, Jr., Esq.
Counsel of Record
Lipsitz Green Scime & Cambria
42 Delaware Avenue
Suite 300
Buffalo, New York 14202
(716) 849-1333

Of Counsel:

Roger W. Wilcox, Jr., Esq.

Amy L. Herring, Esq.